MEMORANDUM

The Complaint Committee ("Committee") of the Minnesota Board of Dentistry has brought disciplinary action against the dental license of William P. Rolfe, D.D.S. ("Respondent"). Respondent's license was temporarily suspended by the Board on August 16, 2000, pursuant to the special provisions of Minn. Stat. § 150A.08, subd. 8 (1998). Thereafter, this disciplinary proceeding was commenced. The Committee claims that Respondent engaged in conduct unbecoming a dentist; abused alcohol or other substances; improperly administered nitrous oxide to himself and others for non-dental purposes; improperly prescribed controlled substances and other medications; failed to maintain adequate dental records on each patient; and is unable to practice dentistry with reasonable skill and safety due to a mental, emotional or other disability.

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Standard of Proof

In professional disciplinary proceedings, such as this one, the Committee bears the burden of proof and must establish the facts at issue by a preponderance of the evidence.[1] This standard of proof applies to all contested cases unless a constitutional provision, statute, or case law requires the application of an alternative standard.[2] In license disciplinary proceedings involving dentists, no statute or case law requires a different standard of proof.

Respondent asserts, however, that constitutional due process and equal protection require the use of a heightened standard of proof in this matter. Respondent maintains that because his license to practice dentistry and his livelihood are at stake, due process requires that the Committee prove its case by a clear and convincing standard of proof. In addition, Respondent contends that, since a higher standard proof is required in attorney disciplinary proceedings, use of the lower preponderance standard in non-attorney disciplinary proceedings violates equal protection. In support of his arguments, Respondent has cited to several non-Minnesota cases in which courts have held that constitutional due process and/or equal protection require the standard of proof in license disciplinary proceedings be clear and convincing.[3]

In *In re Wang*[4], the Minnesota Supreme Court confirmed the application of a preponderance of the evidence standard in professional licensing proceedings involving disciplinary action against a licensed dentist. In so doing, the court noted that no different standard of proof appeared to be required by statute or case law, and the parties had not claimed otherwise.[5] The court, however, admonished finders of fact in license disciplinary cases to bear in mind the gravity of the decision to be made and to be persuaded only by "evidence with heft".[6]

Two years later, the Minnesota Court of Appeals addressed the constitutionality of applying the preponderance standard to non-attorney licensing matters in *In re Ins. Agents' Licenses of Kane*[7]. In that case, insurance agents argued that application of the preponderance of the evidence standard violated equal protection since their licenses could be revoked pursuant to a lower standard of proof, while attorneys' licenses could only be revoked upon a showing of clear and convincing evidence of misconduct. The court rejected the agents' equal protection arguments based on the

unique sui generis nature of attorney disciplinary hearings, society's heightened interest in the outcome of attorney discipline, and the fact that the legal profession is much more subject to accountability where discipline lies with the judiciary.[8] The court found that these distinctions provided a rational basis for employing the clear and convincing standard in attorney licensing proceedings and the preponderance of the evidence standard in other licensing proceedings.[9]

And in *In re Medical License of Friedenson*[10], the Minnesota court of appeals held that the preponderance of the evidence standard applies to disciplinary proceedings against a licensed medical doctor. Noting that the statute governing the Board of Medical Practice's discipline of medical doctors is silent as to the standard of proof, the court applied the preponderance standard pursuant to Minnesota Rules 1400.7300, subp. 5.[11]

In light of the cases discussed and the fact that the statue governing this disciplinary proceeding is silent as to the standard of proof, the Administrative Law Judge concludes that the proper standard of proof to be applied in this matter is the preponderance of the evidence. Yet, the ALJ is mindful of the admonishment in *Wang* that finders of fact in license disciplinary cases bear in mind the gravity of the decision to be made and be persuaded only by "evidence with heft".[12] The findings made here have been adopted applying these standards.

Conduct Unbecoming

Minnesota Statutes § 150A.08, subd. 1(6) provides that the Board may impose discipline on a licensed dentist for "conduct unbecoming a person licensed to practice dentistry … or conduct contrary to the best interest of the public, as such conduct is defined by the rules of the board". The statutory phrase "conduct unbecoming" is defined in Minnesota Rule 3100.6200, which states in relevant part:

> "Conduct unbecoming a person licensed to practice dentistry or dental hygiene or registered as a dental assistant or conduct contrary to the best interests of the public," as used in Minnesota Statutes, section 150A.08, subdivision 1, clause (6), shall include the act of a dentist, dental hygienist, registered dental assistant, or applicant in:
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> A. engaging in personal conduct which brings discredit to the profession of dentistry;
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> B. gross ignorance or incompetence in the practice of dentistry and/or repeated performance of dental treatment which fall below accepted standards;
>
> C. making suggestive, lewd, lascivious, or improper advances to a patient; …

Respondent argues that the prohibition on "conduct unbecoming" a dentist found in Minn. Stat. § 150A.08, subd. 1(6) is unconstitutionally vague as applied to his dating of patients. According to Respondent, the Committee's attempt to discipline him for dating and having sexual relationships with his patients on the grounds that it constitutes "conduct unbecoming" a dentist violates his constitutional due process rights. Respondent contends that the phrase "conduct unbecoming" is so vague as to deny him notice or a reasonable opportunity to know that his conduct is subject to

disciplinary action. And Respondent points out that there is no statute or rule promulgated by the Board that explicitly prohibits dating or sexual relations between a dentist and patient. Accordingly, Respondent asserts that he should not be disciplined for such conduct.

The Committee maintains that while dating patients is not *per se* wrong, dating patients in the irresponsible and harmful manner engaged in by Respondent with E.S. and M.F. constitutes conduct unbecoming a dentist or "personal conduct which brings discredit to the profession". Moreover, the Committee argues that both the courts and the Board have successfully applied the rule against conduct unbecoming in other cases. In *Matter of Schultz*[13], for example, the statutory phrase "conduct unbecoming" was specifically applied in the case of another dentist's sexual misconduct toward female patients. The Minnesota Court of Appeals held in that case that the Board was "uniquely able to determine" what constituted conduct unbecoming a dentist.[14]

In the instant matter, the Committee contends that Respondent's date with E.S. reflected a complete lack of professional discretion and brought "discredit to the profession of dentistry". The Committee points out that Respondent asked E.S. out for drinks on the very day he prescribed narcotic pain pills for her; Respondent asked E.S. if she had the pills with her when he picked her up; Respondent made "suggestive, lewd, lascivious, or improper advances" to E.S. by taking off his swimsuit; and Respondent drank enough beer that he appeared "reasonably" drunk and E.S. did not allow him to drive her home. The Committee also asserts that Respondent engaged in personal conduct that brought discredit to the profession of dentistry during his dating relationship with M.F. In particular, the Committee cites to the numerous narcotic prescriptions Respondent wrote for M.F. over the course of their relationship, and Respondent's recreational use of nitrous oxide with M.F. in his offices after hours.

Neither an administrative agency, such as the Board, nor an administrative law judge may declare a statute unconstitutional as that power is vested in the judicial branch.[15] But like courts, Administrative Law Judges must interpret and apply statutes and rules in a manner that does not violate our constitutions.[16] Under both the United States and Minnesota Constitutions, statutes and rules must meet due process standards of definiteness.[17] In order to satisfy due process, laws must give fair warning to an individual of the conduct prohibited. More precisely, the vagueness doctrine requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[18] A statute is void due to vagueness if it defines the forbidden or required act in terms so vague that individuals must guess at its meaning, or it defines an act in a manner that encourages arbitrary and discriminatory enforcement.[19] If persons "of common intelligence" must speculate as to a statute's meaning, the statute is impermissibly vague.[20]

In a case involving disciplinary action against optometrists' licenses, the Minnesota supreme court considered whether "unprofessional conduct", as a ground for discipline, was vague and an unconstitutional delegation of power to the board.[21] Minn. Stat. § 148.57, subd. 3, governing regulation of the practice of optometry, provided that the board could revoke or suspend the license of any practitioner guilty of "unprofessional conduct". The court concluded that the phrase "unprofessional conduct" was not unduly vague and explained:

> The legislature need not enumerate what specific acts or omissions constitute unprofessional conduct since the phrase "unprofessional conduct" itself provides a guide for, and a limitation upon, the exercise by the board of its power to revoke a practitioner's license.[22]

In concluding that the phrase "unprofessional conduct" was sufficiently definite, the court stated that the legislature cannot be expected to forbid specifically all improper practices likely to occur.[23]

The Administrative Law Judge is persuaded, based upon the rationale articulated in *Reyburn* and the successful application of the prohibition on "conduct unbecoming" in other cases, that the phrase is not impermissibly vague. Moreover, the phrase is further defined in the Board's rules to include suggestive and improper advances to patients, and conduct discrediting the profession. When applied to the facts of this case, the ALJ concludes that the Committee has demonstrated, by a preponderance of the evidence, that Respondent did engage in conduct unbecoming a dentist. Specifically, by improperly placing his forearm on female patients' chests, by dating female patients during the course of their treatment and in a manner bringing discredit to the profession, and by making other suggestive, lewd, lascivious, or improper sexual advances to female patients, Respondent violated Minnesota Statute § 150A.08, subd. 1(6) and Minnesota Rule 3100.6200 A and C. As a person of ordinary intelligence, Respondent knew or should have known that such personal behavior amounts to conduct unbecoming a dentist.

"Stale Allegations" and the Doctrine of Laches

Respondent argues that due process and the doctrine of laches precludes taking disciplinary action against his license based on remote allegations of misconduct. Respondent contends that he is unfairly being forced to defend against nine year old allegations of sexual misconduct by M.S. and six year old allegations of sexual assault by A.D. Respondent maintains that, as a busy dentist who sees hundreds of patients annually, it is unfair to expect him to recall specific facts from nine and six year old dental appointments. Respondent also claims that he has been unfairly prejudiced as neither woman was subject to cross-examination at or near the time of their alleged assaults. And, Respondent points out that both M.S. and A.D. had difficulty remembering facts regarding the alleged assaults.

The Committee argues that the doctrine of laches is inapplicable as a defense against the state when the state is acting in its sovereign capacity.[24] Because the Board is acting in its sovereign capacity to regulate the dental profession for the protection of the public, the Committee maintains that the equitable doctrine of laches does not apply in this proceeding. Alternatively, the Committee asserts that because Respondent has failed to show unfair prejudice as a result of the delay, the remote allegations at issue should be considered.

Application of the doctrine of laches depends on whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.[25] When the state seeks to revoke

professionals' licenses, laches will seldom be found as a matter of public policy unless the licensee has been unduly prejudiced.[26]

In *Fischer v. Independent School Dist. No. 622*[27], an elementary school principal was discharged for sexual misconduct with a student based on events that were over 12 years old. The school principal claimed he was deprived due process by the remoteness of charges, the resulting loss of relevant evidence, and impeachment of witnesses' memories. The court held that the remoteness of the allegations did not result in a denial of due process to the principal. The court pointed out that there is no limitations period in the statute governing teacher terminations. And, given the serious nature of the offense and the lack of any showing that the board unduly delayed in bringing its action after it had received knowledge of the alleged conduct, the court concluded the incident was not too remote in time to be considered.[28] Moreover, the court found that the principal had sufficient procedural due process protections afforded him at the hearing, including an impartial hearing examiner and the opportunity for cross-examination, to ensure that the remoteness of the allegations did not amount to unfair prejudice.[29]

Likewise, in an attorney disciplinary case[30], the Minnesota supreme court rejected an attorney's motion to dismiss based on an alleged 5 ½ year delay in the Board's investigation where the attorney failed to show prejudice. The court explained that unless the attorney had been unfairly prejudiced by the delay, it would not be in the public interest to dismiss a disciplinary hearing because of failure to prosecute promptly. The court stated that a fundamental goal of every disciplinary action is protection of the public.[31] And requiring a showing of prejudice before dismissing a disciplinary action for unreasonable delay is consistent with that goal.[32]

In the instant matter, there is no evidence that the Committee engaged in undue delay. Instead, the record demonstrates that the Committee first learned of M.S.'s and A.D.'s allegations during the course of its investigation of Respondent over the winter-spring of 1999-2000. The Committee began this enforcement action in the summer of 2000 and filed the Notice of Hearing, which gave full notice of the sexual misconduct allegations, on August 25, 2000. The Administrative Law Judge concludes that the Committee did not delay in bringing disciplinary action against Respondent once it learned of the sexual misconduct allegations at issue.

Moreover, Respondent has failed to show that he has been unfairly prejudiced by having to defend against the allegations of M.S. and A.D. The inability of M.S. and A.D. to recall certain facts or details surrounding the alleged assaults is insufficient to establish unfair prejudice where Respondent had every opportunity to cross-examine both women and question their credibility. If anything, M.S.'s and A.D.'s lack of memory hurts the Committee more than Respondent as it is the Committee that bears the burden of proof in this matter. In addition, even though the incident with M.S. is over nine years old, M.S. filed a report with the Hopkins Police Department within a week of the occurrence. And the police conducted interviews with both M.S. and Respondent. The report and interviews, which were tape-recorded and transcribed, were available to Respondent to assist in his defense. And although A.D. never made her accusations known to any authority prior to the Committee's investigation, two of Respondent's dental assistants corroborated the portion of her testimony that she was left alone in the

office with Respondent on August 9, 1994, after having been in the dental chair for almost three hours.

Respondent received a fair hearing with sufficient procedural due process safeguards. The remoteness of the incidents alleged by M.S. and A.D. and Respondent's and his patients' somewhat limited recollections with respect to specific details, is not enough to establish unfair prejudice or a due process violation on the part of the Respondent.

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[1] Minn. R. 1400.7300, subp. 5 (1999); *In re* Friedenson, 574 N.W.2d 463, 466 (Minn. App. 1998), *rev. denied*, (Minn. April 30, 1998).
[2] Minn. R. 1400.7300, subp. 5 (1999); *In re* Wang, 441 N.W.2d 488, 492 (Minn. 1989).
[3] Painter v. Abels, 998 P.2d 931 (Wyo. 2000); Johnson v. Bd. of Gov. of Registered Dentists, 913 P.2d 1339 (Okl. 1996); Davis v. Wright, 503 N.W.2d 814 (Neb. 1993); Ettinger v. Bd. of Medical Quality Assurance, 135 Cal. App.3d 853, 185 Cal. Rptr. 601 (1982).
[4] 441 N.W.2d 488, 492 (Minn. 1989).
[5] Id.at 492 and n. 5. (The court declined to consider the dentist's equal protection argument because it had been raised for the first time on appeal).
[6] Id. at 492.
[7] 473 N.W.2d 869 (Minn. App. 1991), *rev. denied* (Minn. Sept. 25, 1991).
[8] Id. at 874.
[9] Id.
[10] 574 N.W.2d 463 (Minn. App. 1998), *rev. denied* (Minn. April 30, 1998).
[11] Id. at 466.
[12] *Wang* at 492.
[13] 375 N.W.2d 509, 517 (Minn. App. 1985).
[14] Id.; *See also*, Reyburn v. Minnesota State Bd. of Optometry, 78 N.W.2d 351, 355-356 (Minn. 1956).
[15] *See*, Neeland v. Clearwater Memorial Hospital, 257 N.W.2d 366, 369 (Minn. 1977); *In re* Rochester Ambulance Service, a Div. of Hiawatha Aviation of Rochester, 500 N.W.2d 495, 499-500 (Minn. App. 1993); Holt v. State Bd. of Medical Examiners, 431 N.W.2d 905, 906 (Minn. App. 1988), *rev. denied* (Minn. Jan. 13, 1989).
[16] State v. Crims, 540 N.W.2d 860, 867 (Minn. App. 1995), *rev. denied* (Minn. January 23, 1996).
[17] *See*, State v. Normandale Properties, Inc., 420 N.W.2d 259, 261 (Minn. App. 1988), *rev. denied* (Minn. May 4, 1988).
[18] Minnesota League of Credit Unions v. Minnesota Dept. of Commerce, 486 N.W.2d 399, 404 (Minn. 1992), *citing* State v. Century Camera, Inc., 309 N.W.2d 735, 744 (Minn. 1981) (*quoting* Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).
[19] Humenansky v. Minnesota Bd. of Medical Examiners, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995); *citing* Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); Baggett v. Bullitt, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964); State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985).
[20] Proetz v. Minnesota Bd. of Chiropractic Examiners, 382 N.W.2d 527, 534 (Minn. App. 1986), *rev. denied* (Minn. May 16, 1986), *citing* Matter of Welfare of A.K.K., 356 N.W.2d 337, 343 (Minn. App. 1984).
[21] Reyburn, v. Minnesota Bd. of Optometry, 247 Minn. 520, 78 N.W.2d 351 (Minn. 1956).
[22] Id. at 355.
[23] Id. at 356.
[24] Leisure Hills v. Minnesota Dep't. of Human Services, 480 N.W.2d 149, 151 (Minn. App. 1992).
[25] Fetsch v. Holm, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).

[26] *See e.g.*, *In re* N.P., 361 N.W.2d 386, 392 (Minn. 1985), *appeal dismissed* 106 S.Ct. 375 (1985); Fischer v. Independent School Dist. No. 622, 357 N.W.2d 152 (Minn. App. 1984) (upholding elementary school principal's discharge for sexual misconduct based on events that did not come to light until 12 years later).
[27] 357 N.W.2d 152, 155-56 (Minn. App. 1984).
[28] Id.
[29] Id.
[30] *In re* N.P., 361 N.W.2d 386, 392 (Minn. 1985).
[31] Id.
[32] Id.; *See also*, Matter of Schroeder, 415 N.W.2d 436, 441 (Minn. App. 1987), *rev. denied* (Minn. Jan. 28, 1988) (Board of Psychology's two year delay in bringing disciplinary proceeding against psychologist did not violate due process in absence of evidence as to when Board first received complaints).